IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.Nos.477 of 1997

Jeevarathinan .. Appellant/Plaintiff

vs.

1.N.Ramanujam Chettiar
2.R.Manoharan .. Respondent/defendants

Prayer: This second appeal has been preferred u/s 100 CPC against the decree and Judgment dated 08.07.1996, made in A.S.No.11 of 1996, on the file of the Principal Subordinate Judge, Salem, reversing the decree and judgment dated 17.11.1995 made in O.S.No.41/1989, on the file of the Principal District Munsif, Salem.

For Appellant : Mr.V.C.Venkataramana for
M/s A. Thirumurthy
For Respondents : Mr.D.Shivakumaran for R1

No appearance for R2

JUDGMENT

This second appeal has been preferred against the decree and Judgment in A.S.No.11/1996 on the file of the Court of Principal Subordinate Judge, Salem. The plaintiff, who has won his case before the trial court but lost the same in the first appeal, is before this Court in Second appeal.

2. The short facts in the plaint relevant for the purpose of deciding this second appeal are as follows:-

2(a) The suit is for declaration and mandatory injunction in respect of common roads situated in suit S.No.9/16A & S.No.9/20A in between the house sites of the plaintiff and the house of D1 and also on South of house site of the plaintiff and the house of D1 and for mandatory injunction to remove the encroached portion shown in green and red colour in rough plan from the suit property viz. common roads and to restore the same to its original condition. The plaintiff purchased the house plot in S.No.9/16A and 20A situate in Meyyanur Village, Sooramangalam, Salem Taluk, measuring 3060 sq.ft. with measurement of 52 feet East-West on the North, 50 feet East-West on the South, 63 feet South-North on the East and 57 feet

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South-North on the West, situate within the boundaries on the North of East-West common road, on the South of the plot of Angammal, on the west of common well and 20 feet road given by Thandava Gounder and on the East of the property of the plaintiff, by virtue of a registered sale deed dated 17.9.1986 executed in her favour by one R.Gopalan for the valid consideration of Rs.41,220-00.

2(b) The plaintiff has also purchased 2/3 share in the well and also right of way in both the roads, one running East-West and the other running South-North appurtenant to the above said house plot. Patta No.265 was assigned to the plaintiff for the suit property by the Deputy Tahsildar Salem by his proceedings in No.2818/6/II 1986-87 dated 19.1.1987 on the East of the plaintiff's house site. There is a 20 feet road and a well and also on the south of the house site there is a common road and both the roads are common for the owners of the house plots therein. The 1st defendant is the owner of the house on the Eastern side of the house site belonging to the plaintiff. The 1st defendant is also having the right to use the common road, but he is not entitled to encroach upon the said common road in any manner. The 1st defendant has encroached a portion of 1 ½ feet East-West and 27 feet 3 inches south-north, 3 ½ feet East-West and 6 feet 3 inches South-North, 4 feet 9 inches East-West and 13 feet 9 inches South-North and the encroached portion have been clearly shown in green colour in the rough plan filed along with the plaint. The 1st defendant has also encroached upon the East-West common road on the South of the plaintiff's house site to an extent of 3 feet 3 inches North-South and 62 feet 9 inches East-West and the said encroached portion has also been shown in red colour in the rough plan filed along with the plaint. The 1st defendant put up construction in his plot by encroaching in the suit property. Hence, the suit.

3. The 1st defendant has filed a written statement with the following contentions:-

This defendant is the owner of the plot on the East purchased under a sale deed. The width measurements for the two roads are not been correctly given in the plaint. The defendant has not made any encroachment in the common pathway, which belongs to both the plaintiff as well as the defendant. The defendant has not made any encroachment in the common roads and also the private road of Arumuga Gounder or on the northern portion. This defendant has purchased the property much earlier to the purchase of the suit property by the plaintiff. This defendant is in possession and enjoyment of his land for more than 12 years. Since the property is slanting on the Salem Omalur Bypass Road the various measurements given by the plaintiff for the suit property and also for the encroached portion are not correct. The suit is bad for non-joinder of the other owners of the common road and the plaintiff alone cannot file the suit. There was no mediation took place between the parties. The plaintiff is not entitled for an order of mandatory

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injunction. The suit is not valued properly for the purpose of court fee and jurisdiction. Hence, the sit is liable to be dismissed.

4. The 2nd defendant in his written statement has contended as follows:-

4(a) The plaintiff has purchased plot No.2 and the averments regarding the common path way on the North of East-South are true. Only through the East-West road on the South of plot No.2 one can get access to plot No.1. The North-South Road having a breadth of 20 feet exist between the plot No.2 and plots No.3 & 4 is meant for use of the plaintiff and for other plot holders. A well exists on the North-East corner of 20 feet road is meant for use of plot holders. So, the 20 feet road is a common road. The first defendant has unlawfully encroached in both roads and constructed terraced house.

4(b) The second defendant has obtained general power of attorney deed in respect of plot No.1 from the owner of plot No.1 and he is in possession and enjoyment of the same by leasing it to the tenant and is collecting the same. The owner of the plot No.1 has also given his original sale deed with this defendant. Even in the original sale deed of this defendant there is mention about the common path way on the East as well as on the South. This defendant's original sale deed is dated 23.11.1964 and his general power of attorney is dated 4.2.1988. The suit roads are meant for plot holders in S.No.9/2, 3, & 4 (New S.No.9/16A and 9/20A). The first defendant has no right to encroach those common roads. Hence, the suit is liable to be decreed for removing encroachment.

5. On the above pleadings the learned trial Judge has framed six issues originally then recast the same into three for trial. On the side of the plaintiff P.W.1 was examined and Ex.A.1 to A.5 were marked. On the side of the defendant D.W.1 & 2 were examined and Ex.B.1 to B.9 were marked. A Commissioner was appointed and he filed Ex.C.1 & 3 reports and Ex.C.2 & 4 plans. The trial judge has also visited the suit property and has filed his notes of inspection along with Ex.C.5-surveyor plan. After going to through the oral and documentary evidence, the learned trial Judge has decreed the suit as prayed for. Aggrieved by the findings of the learned trial Judge, the defendant has preferred an appeal in A.S.No.11/1996 before the learned Principal Subordinate Judge, Salem, who has after hearing the appellant as well as the respondent and after considering the evidence both oral and documentary, has allowed the appeal thereby setting aside the decree and judgment of the learned trial judge. Hence, the plaintiff has preferred this second appeal.

5. The substantial questions of law involved in this second appeal are as follows:-

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i) Whether the findings of the lower appellate court regarding Ex.C.5, memorandum of inspection report prepared by the District Munsif after due notice to the parties are sustainable in law when the trial court has relied upon the said report along with the other Commissioner reports Ex.C.1 to C.4 for the purpose of granting the relief of mandatory injunction?

ii) Whether the findings given by the lower appellate court regarding the identity of the common road are sustainable in law, when the trial Court has given a categorical findings regarding the existence of the common road after considering the Ex.A.1, A.3, A5 and Ex.B.1, B.2, B.8 and B.9 along with Ex.C.1 to C.5 and when the lower appellate Court has not given any reason to set aside those findings in a manner known to law?

iii) Whether the lower appellate Court is right in rejecting the Ex.C.5 memorandum of inspection report prepared by the District Munsif, who has considered the same along with the other reports of the commissioner without basing its finding solely on the basis of Ex.C.5 as mentioned by the lower appellate Court and when the principle of the decision reported in AIR 1971 Supreme Court 2540 is applicable to the facts of this Case?

6.The Points:-

6(a) The suit property is two roads one on the East and the other one on the south of S.No.9/16A and S.No.9/20A in Meyyanur Village, Sooramangalam, Salem Taluk. According to the plaintiff, he had purchased the suit property under Ex.A.1 which is lying North of East-West common road and also West of North-South common road. Ex.A.5 is the sale deed of the year 1978 relating to the predecessors in title of the plaintiff. In both Ex.A.1 & A.5 there is a recital to the effect that the vendees under those sale deeds are entitled to use the common road on the East as well as on the South of the suit property.

6(b) The learned counsel for the appellant would contend that the learned trial judge after considering Exs.A1, A3 and Exs.B1, B2, B8 and Exs.C.1 to C.5 has come to the conclusion that the suit property viz., common road are to be declared as common and the plaintiff is entitled to use the same as a common road and that as per Ex.C.5 the learned trial Judge has observed that there was an encroachment on the East as well as on the South of the common roads, which are marked in red colour to Ex.C.5. Along with Ex.C.5-survey plan the learned trial Judge has also filed his spot inspection report. The learned first appellate Judge has allowed the appeal preferred by the defendant on the ground that except Ex.A.3 there is no other plan depicting the existence of the path way in the suit survey number property and that Ex.A.3 plan is

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relating not to the suit survey number property but to some other property in S.No.9/2,3 & 4 for which the new survey number is 9/10A whereas the suit survey number property is 9/16A and 9/20A. The learned first appellate judge relying on the documents produced on the side of the defendants viz. Exs.B.1 to B.6 has come to the conclusion that both the pathways cannot be treated as a common pathway and ultimately come to the conclusion that the plaintiff is not entitled to the declaration as well as the mandatory injunction and has dismissed the suit in toto, which necessitated the plaintiff to prefer this second appeal.

6(c) The first and foremost point to be decided in this second appeal is whether the pathways are in existence on the East and South of the plaintiff's property purchased under Ex.A.1 as alleged in the plaint and if there are pathways whether those pathways are common pathways giving right to the plaintiff to get access to the same and whether there is any encroachment made by the 1st defendant in the said pathways obstructing the use of the pathway by the plaintiff in common. A reading of Ex.A.1 description of the schedule in respect of suit survey No.9/16A & 9/20A sold under Ex.A.1 will go to show that there are two pathways situate on the East as well as on the South of the property sold under Ex.A.1. The boundaries description to the property sold under Ex.A.1 reads that on the South lies the common East-West road left by one Thandava Gounder and on the East 20 feet width road left by the same Thandava Gounder. The exact extent of the land sold under Ex.A.1 is having the following measurements:-

i) 52 feet East-West on the North
ii) 50 feet East-West on the South
iii) 63 feet North-South on the East
iv) 57 feet North-South on the West

comprised in 3060 sq.feet. This plot has been earmarked in Ex.C.5-survey plan as plot No.2. So the plot purchased by the plaintiff under Ex.A.1 has been identified as plot No.2 in Ex.C.5. It is pertinent to note that the description given in Ex.A.1 of the plot sold under Ex.A.1 is 3/2 share in the well and also on the Eastern road. But the road on the Eastern side as well as the well do not come within the plot No.2 to Ex.C.2-plan. Plot Nos.3 & 4 shown in Ex.C.5-plan belong to the first defendant under Ex.B.1 & B.5 sale deeds. Along with Ex.C.5-survey plan the learned trial judge has filed his spot inspection report which shows that there is a common road in existence on the East of the property purchased by the plaintiff under Ex.A.1, and the trespassed portion has been marked as 'E, F, G, H, I, J, K, L, M, N' in Ex.C.5-survey plan and the learned trial judge has also observed that there is an East-West common road on the South of the property purchased by the plaintiff under Ex.A.1 and there was also encroachment and the encroached area has been earmarked as 'A B C D' in Ex.C.5-plan. Under such circumstances, the plaintiff is entitled to use the common pathways which are situated on the East as well as on the South of the

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property purchased by him under Ex.A.1 which is earmarked as plot No.2 to Ex.C.5. The encroached portion on the East and South has been shown in red colour in Ex.C.5. The plaintiff is also entitled for mandatory injunction in respect of the encroached portion shown in red colour in Ex.C.5 as prayed for. Under such circumstances, I am of the view that the appeal is to be allowed and the trial Court's judgment is to be restored. Points are answered accordingly.

7. In fine, the second appeal is allowed and the decree and judgment in A.S.No.11 of 1996 on the file of the Principal Subordinate Judge, Salem, is set aside and the decree and judgment of the trial Court in O.S.No.41/1989 on the file of the Court of Principal District Munsif, Salem, is restored, with costs.

Sd/-
Assistant Registrar,

/true copy/

Sub Assistant Registrar.

ssv

To,
1. The Principal Subordinate Judge, Salem. (with records if any)

2. The Principal District Munsif, Salem.

3. The Section Officer,
VR Section, High Court, Madras.

1 cc to Mr. D. Shivakumaran, Advocate, sr. 12418
1 cc to Mr.V.C. Venkataraman, Advocate, sr. 11724

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